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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 643

SAMUEL BAILEY, ET AL.,

Appellants,

vs.

JOE T. PATTERSON, ET AL.,

Appellees.

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM ON BEHALF OF THE CITY OF JACKSON, MISSISSIPPI, ITS MAYOR, COMMISSIONERS, AND CHIEF OF POLICE, APPELLEES.

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INDEX

Subject Index

Page

Motion to Dismiss Appeal or in the Alternative to Affirm on Behalf of the City of Jackson, Mississippi, Its Mayor, Commissioners, and Chief of Police, Appellees 1

This appeal should be dismissed as not within the jurisdiction of this Court because the order appealed from is not an appealable order under 28 U.S.C., Section 1253 2

This appeal should be dismissed as not within the jurisdiction of this Court because the United States District Court from which this appeal was taken did not have jurisdiction of this cause under 28 U.S.C., Section 2281 10

This appeal should be dismissed because the Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims 16

In the alternative, the order appealed from should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument 21

Certificate of Service 24

Table of Cases Cited

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233 5

Beal, et al. v. *Holcomb, Mayor of the City of Houston*, U.S.C.A. 5th, 193 F. 2d 384, cert. den. 347 U.S. 394, 98 L. Ed. 1114 13

Booker v. *State of Tennessee Board of Education*, U.S.C.A. 6th, 240 F. 2d 689, Cert. den. 353 U.S. 965, 1 L. Ed. 2d 915 13

Page

Bryan v. *Austin*, 354 U.S. 933, 1 L. Ed. 2d 1527 8
City of Meridian v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 3 L. Ed. 2d 562 23
City of Morgantown v. *Royal Insurance Company*, 337 U.S. 254, 93 L. Ed. 1347 4
Enelow v. *New York Life Insurance Company*, 293 U.S. 379, 79 L. Ed. 440 3
Ex parte Bransford, 310 U.S. 354, 84 L. Ed. 1249 14
Government & Civic Employees' Organization Com. v. *Windsor*, 116 F. Supp. 354, affirmed 347 U.S. 901, 98 L. Ed. 1061 8-9
Harrison v. *N.A.A.C.P.*, 360 U.S. 167, 3 L. Ed. 2d 1152 23
In the Matter of the Application of Elizabeth Porter Wyckoff, U.S.D.C. Miss., 196 F. Supp. 515 22
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 3 L. Ed. 2d 1058; *N.A.A.C.P.* v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375 23
Monroe v. *Pape*, 365 U.S. 167, 5 L. Ed. 2d 492 9
N.A.A.C.P. v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375 9
Phillips v. *United States*, 312 U.S. 246, 85 L. Ed. 800 14
Poe v. *Ullman*, decided June 19, 1961, 367 U.S. 497, 6 L. Ed. 2d, Adv. Sheet No. 5, page 989 17
Sealy v. *Department of Public Instruction of Pennsylvania*, U.S.C.A. 3rd, 252 F. 2d 898, Cert. den. 356 U.S. 975, 2 L. Ed. 2d 1149 14
United States v. *U.S. Klans, et al.*, U.S.D.C. Ala., 194 F. Supp. 897 22
Wichita Falls Junior College Dist. v. *Battle*, U.S.C.A. 5th, 204 F. 2d 632, Cert. den. 347 U.S. 974, 98 L. Ed. 1113 15

STATUTES CITED

28 U.S.C., Section 1253 ..... 1, 3
28 U.S.C., Section 2281 2
28 U.S.C., Section 2284(5) 3

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MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM ON BEHALF OF THE CITY OF JACKSON, MISSISSIPPI, ITS MAYOR, COMMISSIONERS, AND CHIEF OF POLICE, APPELLEES.

Now Come the City of Jackson, Mississippi, Allen C. Thompson, as Mayor, D. L. Lucky, as Commissioner, Thomas B. Marshall, as Commissioner, and W. D. Rayfield, as Chief of Police, Appellees in the above styled and numbered cause, by their attorneys, pursuant to Rule 16 of the Revised Rules of this Court, and respectfully move this Court to dismiss the appeal in this cause or in the alternative to affirm this cause, and as grounds therefor assign the following:

(1) This appeal should be dismissed as not within the jurisdiction of this Court because the order appealed from is not an appealable order under 28 U.S.C., Section 1253.

(2) This appeal should be dismissed as not within the jurisdiction of this Court because the United States District Court from which this appeal was taken did not have jurisdiction of this cause under 28 U.S.C., Section 2281.

(3) This appeal should be dismissed because the Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims.

(4) In the alternative, the order appealed from should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This appeal should be dismissed as not within the jurisdiction of this Court because the order appealed from is not an appealable order under 28 U.S.C., Section 1253.

The first page of Appellants' Jurisdictional Statement states that this appeal is from a judgment of the lower Court entered on November 17, 1961, "which denied Appellant's application for preliminary injunctions." We respectfully take issue with that statement. The order appealed from retained jurisdiction of the action but stayed further proceedings therein "for a reasonable length of time" for the parties to repair to the state Court in which the issues may now be pending or to institute an action in the state Court for the adjudication of said issues.

Counsel for Appellants take the position that any order which does not immediately grant an application for a preliminary injunction thereby denies same. We submit that an order staying the proceedings "for a reasonable length of time" is purely a procedural matter within the discretion of a three-judge Court sitting as a Court of equity,

We also submit that 28 U.S.C., Section 1253, which created an exception to the rule of finality required for an appeal to this Court should be strictly construed and should not be broadened by judicial interpretation. Counsel for Appellants are in effect asking this Court to amend 28 U.S.C., Section 1253, so as to permit an appeal from an order of a three-judge Court which does not immediately either grant or deny a motion for an interlocutory injunction.

If Congress had intended the staying of proceedings in a three-judge Court for a reasonable period of time as grounds for an appeal to this Court, it could have easily so provided. We believe that Congress knows the difference between an order staying the proceedings before the Court and an order granting or denying an injunction. 28 U.S.C., Section 2284(5), requires a three-judge Court to stay the proceedings before it under certain circumstances. We believe that if Congress had intended that an order staying proceedings for a reasonable length of time be appealable, it would have so stated.

We respectfully submit that orderly administration of justice would not best be served by permitting an appeal to this Court from every order of a three-judge Court staying proceedings therein for a reasonable period of time.

In *Enelow* v. *New York Life Insurance Company*, 293 U.S. 379, 79 L. Ed. 440, an action at law was filed to recover the proceeds of a policy of life insurance. The insurer interposed an equitable defense and petitioned the Court for a hearing on the equitable defense in advance of a trial by jury of the legal issues. The District Court sustained insurer's petition. This Court held that the action of the District Court, in denying the plaintiff a trial by a jury of the legal issues, in effect constituted

an injunction restraining the proceedings at law from which an appeal could be taken. In so holding, however, this Court was careful to state:

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, *as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.*"*

In *City of Morgantown* v. *Royal Insurance Company*, 337 U.S. 254, 93 L. Ed. 1347, the insurer filed suit to reform an insurance policy. The defendant filed a counterclaim and a demand for a jury trial. The District Court granted a motion to strike the demand for a jury trial and set the case for trial to the Court without a jury. The defendant appealed, and the Court of Appeals dismissed the appeal, 169 F.2d 713. This Court affirmed, and, in an opinion delivered by Mr. Justice Murphy, stated:

> "The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the Enelow and Ettelson Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."
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*Note: All italics ours unless otherwise indicated.

"Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

* * *

"But piecemeal appeals have never been encouraged. The growth of the law of procedure in the United States during the last half-century has been steadily in the direction of simplicity and directness in the administration of justice. To that end, and with careful regard for the constitutional rights of the parties, this Court, pursuant to specific authorization by Congress, adopted the Rules of Civil Procedure, abolishing procedural distinctions between law and equity and establishing a single unified practice. We would ill serve the stated purposes of the Rules of Civil Procedure were we to perpetuate by analogy distinctions which the rules expressly disavow. The Court of Appeals was correct in dismissing the appeal and its judgment is affirmed."

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233, involved the question whether, in an action for an accounting, an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal could be taken. In answering this question in the negative, this Court, speaking through Mr. Justice Reed, said:

"Congress has long expressed a policy against piecemeal appeals. The reasons for such a policy were stated as follows:

" 'From the very foundation of our judicial system the object and policy of the acts of Congress in rela-

tion to appeals and writs of error (with single exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.' McLish v. Roff, 141 US 661, 665, 666, 35 L ed 893, 894, 895, 12 S Ct 118.

"Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 84, provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments. That requirement of finality has remained a part of our law ever since, and now appears as Sec. 1291 of the Judicial Code.

"The trial court's interpretation of the quoted contract clause and its order denying a stay could not be called a final decision under Sec. 1291. It was as surely an interlocutory order as the District Court's order in Shanferoke Coal & Supply Corp v. Westchester Service Corp. 293 US 449, 451, 79 L ed 583, 586, 55 S Ct 313. The question here presented involves the interpretation of 28 USC Sec. 1292 (1) which makes an exception to the requirement of finality, permitting appeals from 'interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.' Appealability here turns on whether the District Court's refusal to stay this trial for arbitration was the refusal of an 'injunction' under Sec. 1292.

"The provision for interlocutory appeals was first introduced in 1891 when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat 826. Section 7 of that Act allowed appeals from

interlocutory orders in equity 'granting or continuing' injunctions, but from those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of Sec. 1292 in its present form. No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history although the changes seme plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Cougress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicality of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp. 293 US 449, 451, 79 L ed 583, 586, 55 S Ct 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.

"A series of decisions of this Court has developed the rationale for determining the appealability of such an interlocutory order as this under Sec. 1292, and its predecessors. The appealability of routine interlocutory injunctive orders raised few questions. See Georve v. Victor Talking Machine Co. 293 US 377, 79 L ed 439, 55 S Ct 229. There the statute was clear. It was when stay of proceedings, in distinction of injunctions, were appealed that the issue of jurisdiction became sharp."

• • •

"The Morgantown Case controls here. *Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the Enelow and the Ettelson Cases as a stay through equitable principles of a common-law action.*"

• • •

"It is difficult to generalize as to whether interlocutory appeals are or not advantageous to an efficient administration of justice. A compromise has been worked out by Congress through Sec. 1292. But that compromise does not authorize appeals to simplify litigation. *This ruling was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction.*"

We submit that under the rule announced by this Court in the above cited cases, this appeal should be dismissed as premature. Counsel for Appellants cite *Bryan* v. *Austin*, 354 U.S. 933, 1 L. Ed. 2d 1527; *Government & Civic Employees' Organization Com.* v. *Windsor*, 116 F. Supp. 354,

affirmed 347 U.S. 901, 98 L. Ed. 1061; and *N.A.A.C.P.* v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375, in support of their position that the order of the lower Court of November 17, 1961, is appealable. We respectfully submit that these cases are not authority for that position.

In *Bryan* the judgment of the lower Court was vacated because the statute attacked had been repealed and the case had become moot. The case as reported does not indicate that the question of the appealability of the lower Court's order was either raised or decided. There is no indication that the question of the appealability of the order was raised or decided in either *Windsor* or *Bennett*. We do not believe that the action taken in any particular case is authority for its propriety unless the specific issue was raised. Footnote 50 of this Court's opinion in *Monroe* v. *Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, states in part:

> "The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of Sec. 1983, no inference to the contrary can any longer be drawn from those cases."

We, therefore, respectfully submit that the cases cited by counsel for Appellants are not authorities in support of their position and that the appeal in this case should be dismissed.

This appeal should be dismissed as not within the jurisdiction of this Court because the United States District Court from which this appeal was taken did not have jurisdiction of this cause under 28 U.S.C., Section 2281.

The gist of Appellants' action is now and has always been an effort to stop the State Court prosecutions of the self-styled Freedom Riders. This necessarily resolves itself into purely factual issues as to whether the various persons arrested were or were not guilty of a breach of the peace which justified the arrests. None of them was arrested under the segregation statutes attacked in the case. (Exhibits 32, 33, 34 & 35).

The Mayor of the City of Jackson testified that he had forgotten that the city ordinance attacked in this case was in existence until this hearing, and that no instructions had been given city police with respect to controlling the use of bus or railroad terminals by either race. (R. 274). He testified that there was no objection to members of the colored race using facilities designated as reserved for members of the white race. (R. 275). He testified that there had been no arrests or prosecutions in the City of Jackson under any of the segregation statutes or the ordinance attacked in this case. (R. 276).

W. D. Rayfield, Chief of Police, testified that no person had been arrested in Jackson for using any particular facility and that no arrests had been made under the city ordinance attacked. (R. 280-281).

Joe T. Patterson, Attorney General of Mississippi, testified that trains and planes in this State are integrated and that no effort is made to segregate public transportation facilities in Mississippi. (R. 332). He testified that in his fourteen years as Attorney General and Assistant Attorney General he has neither prosecuted nor threatened to prosecute under any of said segregation statutes. (R.

332 & 338). He testified that said segregation statutes have not been enforced in Mississippi for many years and that no Negroes have been arrested for their use of any transportation facilities. (R. 337 & 342).

Appellants' witnesses, Renegar, Dobbins, Pickle and Turner, testified that no effort is made in the City of Jackson to control the action of Negroes either in the terminals or on carriers. Renegar (R. 500-502); Dobbins (R. 114-115 & 518); Pickle (R. 119-120); Turner (R. 160-161).

It is most significant that the Appellants showed no arrest of any person in the City of Jackson prior to April, 1961, when the Freedom Riders made their much publicized invasion. It is inconceivable that in a City of 150,000 people, almost equally divided between white and colored, that the Appellants could not have shown arrests and prosecutions of colored people if any effort were being made to enforce the segregation statutes and ordinance complained of.

This leaves solely the question of the arrests of the Freedom Riders. At the times of these arrests both white and colored people were arrested in the same locality for the same reason. Renegar (R. 90 & 100-101); Rayfield (R. 287); Ray (R. 361 & 373). The fact that neither race, color nor location had anything to do with these arrests is made clear by Appellants' witness Ray's testimony:

> "Q. I'll ask you whether or not in practically every instance there were members of both races arrested in exactly the same location.
>
> "A. That's correct.
>
> "Q. I want to ask you whether the race or color of any individual arrested had anything to do with whether or not that person was or was not arrested.
>
> "A. No, sir, did not." (R. 373)

The only issue, therefore, raised by this action is whether the arrests of the Freedom Riders were justified under the

facts and circumstances then existing. The fact that the prosecution of the Freedom Riders in the State Court is the real issue is demonstrated by the allegations of the complaint and Jurisdictional Statement, paragraph 4 of the original complaint alleged that the class represented by the Appellants was composed of Negro citizens and residents of the State of Mississippi.

Paragraph 4 of the amended complaint alleged that this action was brought by the Appellants on behalf of themselves and on behalf of "*other Negroes* similarly situated". Realizing that this class was not large enough to cover the Freedom Riders, who were composed of both white and colored people, the Appellants, on page 21 of their Jurisdictional Statement, re-defined the class involved as follows:

> "The class, therefore, consists of *persons* threatened by the segregation statutes or ordinances and practices (including arrest and prosecution for breach of the peace) of the State and the City of Jackson . . .".

Footnote 7, on page 21 of the Jurisdictional Statement, explains this belated amendment of the class involved in this litigation because the evidence disclosed that white persons, as well as Negroes, had been arrested. Therefore, we submit that it is apparent that the real and only controversy involves the propriety of the arrest of the white and colored Freedom Riders. This has nothing to do with the segregation statutes and does not involve discrimination in any way. We respectfully submit that these factual questions as to the propriety of those arrests under admittedly constitutional statutes are not proper issues for a three-judge Court. We raised this issue in the lower Court by motion to dissolve the three-judge Court. Where it appears that the three-judge Court did not have juris-

diction of this controversy, there would be no right to maintain this direct appeal to this Court.

In *Booker* v. *State of Tennessee Board of Education*, U.S.C.A. 6th, 240 F. 2d 689, Cert. Den. 353 U.S. 965, 1 L. Ed. 2d 915, the plaintiffs alleged discrimination under certain Tennessee statutes and sought to enjoin the Board of Education from refusing to admit plaintiffs to Memphis State College. The District Court held that the gist of the controversy was factual involving alleged discrimination under the Fourteenth Amendment and declined to take steps to convene a three-judge Court. In affirming this action of the District Court, the Court of Appeals said:

> "Plaintiffs contend that under the Federal Constitution, particularly the Fourteenth Amendment, the validity of the Tennessee segregation statutes and state constitution was directly involved and a three-judge court was therefore required. *However, the gist of the controversy was factual, namely, the existence of alleged discrimination under the Fourteenth Amendment.*"
>
> • • •
>
> "As the District Court had jurisdiction it properly proceeded with the trial. The principal issue was factual, namely, whether continuation of discrimination prohibited by the equal protection clause of the Fourteenth Amendment was contemplated by the proposed plan."

In *Beal, et al* v. *Holcomb, Mayor of the City of Houston*, U.S.C.A. 5th, 193 F. 2d 384, cert. den. 347 U.S. 394, 98 L. Ed. 1114, the complaint alleged that the plaintiffs were denied the right to use the municipal golf courses because they were members of the Negro race. It further alleged that they were denied said rights under certain Texas stat-

utes, and they sought an injunction predicated on the unconstitutionality of said statutes. The Court held that it was not a proper case for the convening of a three-judge Court in that it involved primarily the question of discrimination under the Fourteenth Amendment to the Federal Constitution.

In *Sealy* v. *Department of Public Instruction of Pennsylvania,* U.S.C.A. 3rd, 252 F. 2d 898, Cert. den. 356 U.S. 975, 2 L. Ed. 2d 1149, the Court said:

> "Mere attack on regulations or method of enforcement of a statute is not sufficient to justify the interposition of a three-judge court. Ex parte Bransford, 1939, 310 U.S. 354, 60 S. Ct. 947, 84 L. Ed. 1249, William Jameson & Co. v. Morgenthau, 1939, 307 U.S. 171, 59 S. Ct. 804, 83 L. Ed. 1189."

In *Ex parte Bransford,* 310 U.S. 354, 84 L. Ed. 1249, the Supreme Court of the United States said:

> "Jurisdiction, properly assumed, may be lost by the special court, when it appears that a prerequisite such as need for relief against state officers is lacking. Even where the statute is attacked as unconstitutional, Sec. 266 is inapplicable *unless the action complained of is directly attributable to the statute.* There is no indication that Congress sought by Sec. 266 to have every attack on the constitutionality of a state statute determined by a three-judge court."

In *Phillips* v. *United States,* 312 U.S. 246, 85 L. Ed. 800, the Court said:

> "But the enforcement of a 'statute' within the meaning of Sec. 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness.

> As Mr. Justice Cardozo said of a related problem affecting the business of the federal courts, 'we do not travel back so far.' Gully v. First National Bank, 299 U.S. 109, 116, 81 L. Ed. 70, 74, 57 S. Ct. 96."
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>
> "If the Governor's action is subject to restraint in the District Court, the procedural road to be taken is the normal course of litigation in a federal district court and not the short cut of Sec. 266."

In the case of *Wichita Falls Junior College Dist. v. Battle*, U.S.C.A. 5th, 204 F. 2d 632, Cert. den. 347 U.S. 974, 98 L. Ed. 1113, the Court said:

> "The relief prayed was that the defendants be enjoined from excluding plaintiffs from admission to the college as students upon the ground of their membership in the Negro race, and that a statutory three-judge court be convened *for the purpose of determining the constitutionality of the provisions of the constitution and statutes of Texas which require racial segregation in State educational institutions.*"
>
> • • •
>
> "*. . . the question for decision is merely whether the policies, usages and customs of the appellants actually do discriminate against the appellees on account of their race and color in violation of the aforesaid Equal Protection Clause. Such an issue is a factual one and obviously does not address itself to a three-judge court.*"

We, therefore, respectfully submit that the lower Court, as a three-judge Court, did not have jurisdiction of this cause and that, therefore, this appeal from said Court should be dismissed.

This appeal should be dismissed because the Appellants have no standing to litigate the constitutional issues presented because of the non-justiciability of Appellants' claims.

We have already pointed out that the segregation statutes attacked in this case have not been enforced for many years. This is emphasized by the fact that the three Appellants have been residents of Jackson, Mississippi, from fifteen to twenty years, and none of them have been threatened with arrest or prosecution under any of said statutes or the city ordinance. Broadwater (R. 42); Jacob (R. 53); Bailey (R. 73). Neither the City of Jackson nor any of its officials has ever refused either of them anything that he wanted to do. Typical of the testimony of the Appellants is that of Jacob:

> "Q. You have never been threatened with arrest or prosecution for violation of any of those statutes or that ordinance?
>
> "A. No.
>
> "Q. And never denied any right, privilege or immunity you claim under any of those statutes or that ordinance?
>
> "A. No.
>
> "Q. You have never been denied the right to do anything by the officials or any officer of the City of Jackson that you wanted to do, have you?
>
> "A. No, I haven't." (R. 53-54)

Bailey testified:

> "Q. Have you ever been denied any right, privilege or immunity which you sought under any of these statutes or ordinances complained of in this action?
>
> "A. No, I haven't myself." (R. 72)

The fact that these colored Appellants are registered voters and exercise that right in Jackson is additional evidence that this City does not attempt to discriminate against its colored citizens in any manner. Broadwater (R. 40); Jacob (R. 52); Bailey (R. 71).

The fact that these Appellants want to stop the prosecutions of the Freedom Riders in the State Court does not give them standing or an interest in the controversy which entitles them to an adjudication of the issues. This case presents an unusual situation in that the Appellants were neither arrested nor threatened with arrest. None of those arrested or threatened with arrest were offered as witnesses or made parties to this action. The state officials in control of the litigation of the State Court were not made parties to this action. Notwithstanding these facts, the Appellants seek to enjoin that State Court litigation. We find this difficult to comprehend when we realize that the State Court litigation is the one and only place where the rights of the Freedom Riders, constitutional and otherwise, can be finally determined. The Appellants have no more right to litigate those issues for the Freedom Riders than any other citizen who has merely an academic interest in the issues involved.

In *Poe* v. *Ullman*, decided June 19, 1961, 367 U.S. 497, 6 L. Ed. 2d, Adv. Sheet No. 5, page 989, this Court, speaking through Mr. Justice Frankfurter, held that the existence of a State statute and the allegation that the principal law enforcement officer of the State intends to prosecute any offenses against Connecticut law, does not constitute that immediate harm or immediate threat of harm to justify a suit by a citizen who has not been actually arrested or threatened with arrest where the facts disclose that the State statute has not been enforced for many years, and said:

"Appellants' complaints in these declaratory proceedings do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices. The allegations are merely that, in the course of his public duty, he intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. See United Public Workers v. Mitchell, 330 US 75, 88, 91 L ed 754, 765, 67 S Ct 556."

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"What was said in another context is relevant here. 'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' Nashville, C & St. L. R. Co. v. Browning, 310 US 362, 369, 84 L ed 1254, 1258, 60 S Ct 968.

"The restriction of our jurisdiction to cases and controversies within the meaning of Article 3 of the Constitution, see Muskrat v. United States, 219 US 346, 55 L ed 246, 31 S Ct 250, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Ash-

wander v. Tennessee Valley Auhtority, 297 US 288, 341, 346, 80 L ed 688, 707, 710, 56 S Ct 466 (concurring opinion). In part the rules summarized in the Ashwander opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."

• • •

"These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' Parker v. County of Los Angeles, 388 US 327, 333, 94 L ed 144, 147, 70 S Ct 161."

• • •

"The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several mainifestations—each having its own 'varied application'—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, *only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.*"

• • •

"It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitution-

ality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting."

• • •

"The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."

• • •

"Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the *litigants* of denying *them* the relief sought. Both these factors justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court.

"Dismissed."

We respectfully submit that these Appellants have not shown the required interest or standing to entitle them to the injunctive relief sought by this action, and this Court, in its per curiam opinion in this case of December 18, 1961, recognized this situation and stated:

"A federal injunction to stay state criminal proceedings is an extraordinary remedy. Cf. *Douglas* v. City of Jeannette, 319 U.S. 157; Ex parte Young, 209 U. S. 123. In addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts."

We respectfully submit that this appeal should be dismissed.

In the alternative, the order appealed from should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The relief sought in this case involves an interpretation of our breach of the peace statutes enacted in 1960 which have not been presented to or construed by the Supreme Court of Mississippi. The unsubstantiated allegations of counsel for Appellants that these statutes are being used to enforce segregation of the races is an issue which should first be presented to the Supreme Court of Mississippi. It is certainly not an issue to be determined by a three-judge Court sitting in equity without giving the Courts of Mississippi an opportunity to construe the statutes or the actions taken thereunder.

The situation presented by the organized and publicized trips of the Freedom Riders to Jackson does not actually involve race relations or discrimination. Jackson was confronted with its obligation to maintain law and order under circumstances which aroused extreme resentment among the people of the City and State. We doubt if General Sherman was any more unpopular during his march through Georgia. The visits of these same people in an adjoining State had resulted in violence and bloodshed. (R. 296 & 409-430). Jackson was determined that this would not be repeated in our City and State. In order to maintain law and order, our police required our visitors and our local citizens not to congregate in public places. Members of both races were treated exactly the same. Rayfield (R. 290, 293 & 295). The police had been advised in advance that the Freedom Riders had make arrangements to stay

at Tougaloo College near Jackson. The City had cars available at the bus terminal to take them safely to their destination if they had been willing to go. (R. 308). Within a matter of months, the Freedom Riders had left a record in judicial decisions. *United States* v. *U.S. Klans, et al.* U.S.D.C. Ala., 194 F. Supp. 897; *In the Matter of the Application of Elizabeth Porter Wyckoff*, U.S.D.C. Miss., 196 F. Supp. 515. In the *Klans* case, District Judge Johnson, referring to the activities of the Freedom Riders, stated:

> "... the rights of the public to be protected from the evils of their conduct is a greater and more important right."

The efforts on the part of Appellants to show discrimination in Jackson were wholly unsubstantial. For instance, their witness Evers testified that he had been Field Secretary in Jackson for the N.A.A.C.P. since 1954 and has occasion to use the Jackson airport from fifteen to twenty times a year. (R. 140). On one occasion an unidentified waitress refused to serve him in the restaurant. (R. 141). He did not report this incident to anyone in authority at the airport or with the City. (R. 154). Appellants' witness, Dr. Jane McAllister, testified that she had commuted daily by bus from Jackson to Vicksburg, Mississippi for ten years. (R. 311). As a colored person, she had always sat where she wished on the bus. (R. 325). On one occasion during that ten-year period she was treated rudely by a Jackson policeman. (R. 314-315). We submit that these isolated instances emphasize the absence of discrimination generally. The organization which is financing this litigation, with the resources at its command, could have easily shown more discrimination against red-headed people than it did against Negroes in this case.

We submit that the action of the lower Court in retain-

ing jurisdiction and applying the doctrine of abstention was eminently correct under numerous recent decisions of this Court. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 3 L. Ed. 2d 1152; *City of Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 3 L. Ed. 2d 562; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 3 L. Ed. 2d 1058; *N.A.A.C.P.* v. *Bennett*, 360 U.S. 471, 3 L. Ed. 2d 1375. Annotation on discretion of Federal Court to remit relevant State issues to State Court, 3 L. Ed. 2d 1827.

Counsel for Appellants state that the *Harrison* case is not applicable because the Court was assured that there would be no enforcement of the segregation statutes involved pending final adjudication of the issues. Every law enforcement officer who took the stand in this case, including the Attorney General of Mississippi, the Mayor of Jackson, and the Chief of Police, testified that neither the City nor the State was enforcing the segregation statutes attacked in this case and had not done so for many years. We fail to see the alleged distinction between this case and the *Harrison* case.

We respectfully submit that the appeal in this case should be dismissed, and in the alternative, the order of the lower Court should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 643

SAMUEL BAILEY, ET AL,

Appellants,

v.

JOE T. PATTERSON, ET AL.,

Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this — day of January, 1962, I served a copy of the "Motion to Dismiss Appeal or in the Alternative to Affirm on behalf of the City of Jackson, Mississippi, its Mayor, Commissioners, and Chief of Police, Appellees" upon counsel for all parties to the case at the addresses indicated below, by depositing copies of same, addressed to each as indicated, in the United States mail, postage prepaid:

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(867-2)